A

Reebok (M) Sdn Bhd v CIMB Bank Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-2459–12 OF 2017
HAMID SULTAN, HANIPAH FARIKULLAH AND KAMALUDIN MD SAID JJCA
6 AUGUST 2019

C

Contract — Settlement agreement — Construction of — Bank after obtaining judgment against borrower for amounts outstanding under credit facilities entered into settlement agreement ('SA') with borrower — SA provided for revival of bank's rights to execute judgment and commence foreclosure proceedings if borrower D *defaulted — Whether bank did not have to formally terminate SA in order to revive its rights under the judgment — Whether SA broke down and ceased to be of effect when borrower asked bank for indulgence to defer payment and then failed to comply with condition on which bank granted indulgence — Whether borrower could not claim it overpaid amount stated in SA by taking into account payments* E *it made before SA was entered into — Whether bank already taken into account all previous payments made by borrower in deriving settlement amount stated in SA*

The respondent ('CIMB') had obtained a judgment against the appellant ('Reebok') for RM5,329,067.93 and RM589,074.67, being the sums owing as F at 6 July 2010 under, respectively, overdraft facilities and a term loan which CIMB had granted to Reebok. Both judgment sums carried interest. The parties subsequently entered into a settlement agreement ('SA') under which Reebok agreed to pay CIMB a sum of RM4.99m owing as at 18 March 2011 over a period of 72 months starting from 1 May 2011 and ending on 1 April G 2017. The amount was to be paid by 71 monthly instalments of RM50,000 and the balance in a lump sum payment in the 72nd month. Among other conditions, the SA stated that if Reebok defaulted in the payment schedule, CIMB would proceed with execution of the judgment and foreclosure over land that Reebok had charged to CIMB as security. Reebok's failure to comply H with the SA resulted in CIMB commencing foreclosure proceedings on the charged land in 2015. In its application to court for an order for sale of the land, CIMB stated that up till 30 November 2014, CIMB had received RM5,522,746.75 from Reebok. Comparing that figure to the amount stated in the SA, Reebok concluded that it had overpaid CIMB by RM532,746.75 I and sued CIMB to recover that sum. Reebok claimed the SA replaced the judgment and what was finally payable to CIMB was only the lump sum figure of RM4.99m without any interest thereon since the SA made no mention of interest. Reebok also contended that CIMB had to formally terminate the SA before it could revive any right to execute the judgment or commence

foreclosure proceedings. The High Court dismissed Reebok's claim after finding that Reebok had not even fully paid the RM4.99m under the SA. Reebok appealed against the decision.

Held, unanimously dismissing the appeal and affirming the High Court's decision:

(1) There was no dispute that under the settlement agreement ('SA'), the amount outstanding was accepted by the parties to be 'RM4,990,000 as at 18.3.2011'. Between that date and 28 May 2014 (after which date no payments were received from Reebok), the undisputed evidence was that Reebok had only paid CIMB RM4,804,391.91. The trial judge was therefore right to say that there had been no overpayment under the SA as alleged (see paras 26 & 28).

(2) Reebok's allegation of overpayment was based on two payments it had made before the date of the SA, which payments when added to the RM4,804,391.91 brought the figure up to RM5,522,746.75. Those two payments were clearly not paid under the SA and could not be considered when determining whether there had been any overpayment under the SA. Those two payments were already taken into account in deriving the amount of RM4.99m under the SA. There was no evidence whatsoever that Reebok had paid more than RM4.99m under the SA. In fact, it had not even paid the full sum of RM4.99m under the SA (see paras 27–30 & 39).

(3) Nowhere in the SA did it say that the sum of RM4.99m was the full and final settlement sum but only that that was the amount owing as at 18 March 2011. It was also obvious from Reebok's contemporaneous conduct that it was never under the impression that the RM4.99m was a full and final settlement amount but only the amount due as at 18 March 2011. The terms of the SA were sufficiently broad to allow CIMB to claim interest on the judgment sum. The parties were taken to have intended that interest should apply to claims of the kind now in issue (see paras 36 & 38).

(4) The SA expressly provided for the revival of CIMB's right to proceed with execution of the judgment as well as with foreclosure proceedings if Reebok defaulted in complying with the terms of the SA. The SA broke down and was no longer in force when Reebok asked CIMB for indulgence (vide its letter dated 15 January 2015) to defer payment and then failed to comply with the condition on which CIMB was willing to grant the indulgence sought. CIMB then proceeded with the foreclosure proceedings and it was entitled to do so (see paras 43–44 & 46).

[Bahasa Malaysia summary

Responden ('CIMB') telah memperoleh penghakiman terhadap perayu ('Reebok') untuk RM5,329,067.93 dan RM589,074.67, sebagai jumlah yang terhutang sehingga 6 Julai 2010 di bawah, masing-masingnya, kemudahan overdraf dan pinjaman berjangka yang telah diberikan oleh CIMB kepada Reebok. Kedua-dua jumlah penghakiman mempunyai faedah. Pihak-pihak kemudian telah memasuki perjanjian penyelesaian ('PP') yang mana Reebok telah bersetuju untuk membayar CIMB sejumlah RM4.99 juta yang terhutang sehingga 18 March 2011 dalam tempoh 72 bulan bermula dari 1 Mei 2011 dan berakhir pada 1 April 2017. Jumlah tersebut kena dibayar secara ansuran selama 71 bulan berjumlah RM50,000 dan baki dalam bayaran sekali gus pada bulan ke-72. Antara syarat lain, PP tersebut menyatakan bahawa jika Reebok gagal mematuhi jadual pembayaran, CIMB akan meneruskan pelaksanaan pengkahiman itu dan perampasan tanah yang telah dicagarkan oleh Reebok kepada CIMB sebagai jaminan. Kegagalan Reebok mematuhi PP tersebut mengakibatkan CIMB memulakan prosiding perampasan tanah yang digadaikan pada 2015. Dalam permohonannya kepada mahkamah untuk perintah jualan tanah tersebut, CIMB menyatakan bahawa sehingga 30 November 2014, CIMB telah menerima RM5,522,746.75 daripada Reebok. Dengan membandingkan jumlah itu dengan jumlah yang dinyatakan dalam PP tersebut, Reebok menyimpulkan bahawa ia telah terlebih membayar CIMB sebanyak RM532,746.75 dan telah menyaman CIMB untuk mendapat balik jumlah tersebut. Reebok mendakwa PP telah menukar penghakiman itu dan apa yang akhirnya kena dibayar kepada CIMB hanya angka sekali gus sejumlah RM4.99 juta tanpa apa-apa faedah ke atasnya memandangkan PP tidak menyebut apa-apa tentang faedah. Reebok juga menegaskan bahawa CIMB perlu secara formal menamatkan PP sebelum ia boleh menghidupkan semula apa-apa hak untuk melaksanakan penghakiman atau memulakan prosiding perampasan. Mahkamah Tinggi telah menolak tuntutan Reebok selepas dapatan bahawa Reebok tidak membayar sepenuhnya RM4.99 juta di bawah PP itu. Reebok telah merayu terhadap keputusan tersebut.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Tiada pertikaian bahawa di bawah perjanjian penyelesaian ('PP'), baki jumlah tersebut diterima oleh pihak-pihak sebagai 'RM4,990,000 as at 18.3.2011'. Antara tarikh tersebut dan 28 Mei 2014 (selepas tarikh itu tiada bayaran diterima daripada Reebok), keterangan yang tidak dipertikaikan adalah bahawa Reebok telah hanya membayar CIMB RM4,804,391.91. Hakim perbicaraan dengan itu adalah betul untuk mengatakan bahawa tiada lebihan bayaran di bawah PP itu sepertimana dikatakan (lihat perenggan 26 & 28).

(2) Pengataan Reebok tentang bayaran lebihan adalah berdasarkan dua

bayaran yang telah dibuatnya sebelum tarikh PP itu, yang mana bayaran-bayaran tersebut apabila ditambah dengan RM4,804,391.91 memberi angka sejumlah RM5,522,746.75. Dua bayaran tersebut jelas tidak dibayar di bawah PP itu dan tidak boleh diambil kira apabila menentukan sama ada terdapat apa-apa lebihan bayaran di bawah PP itu. Dua bayaran tersebut telahpun diambil kira dalam memperoleh jumlah RM4.99 juta di bawah PP itu. Tiada keterangan apa pun bahawa Reebok telah membayar lebih daripada RM4.99 juta di bawah PP itu. Malah, ia tidak pernah membayar jumlah penuh sebanyak RM4.99 juta di bawah PP itu (lihat perenggan 27–30 & 39).

(3) Tiada mana-mana dalam PP yang mengatakan bahawa jumlah RM4.99 juta adalah jumlah penuh dan muktamad tetapi bahawa hanya itu adalah jumlah terhutang sehingga 18 Mac 2011. Ia juga jelas daripada tingkah laku semasa Reebok bahawa tidak pernah di bawah tanggapan bahawa RM4.99 juta adalah jumlah penyelesaian penuh dan muktamad tetapi hanya amaun yang terhutang sehingga 18 Mac 2011. Syarat-syarat PP adalah cukup luas untuk membenarkan CIMB menuntut faedah atas jumlah penghakiman. Pihak-pihak diambil untuk menyatakan bahawa faedah itu patut terpakai terhadap jenis tuntutan yang kini menjadi isu (lihat perenggan 36 & 38).

(4) PP secara jelas memperuntukkan penghidupan semula hak CIMB untuk meneruskan pelaksanaan penghakiman serta prosiding perampasan jika Reebok gagal mematuhi syarat-syarat PP. PP itu telah dilanggar dan tidak lagi berkuatkuasa apabila Reebok meminta CIMB untuk kelonggaran (melalui suratnya bertarikh 15 Januari 2015) untuk menangguhkan pembayaran dan kemudian gagal mematuhi syarat yang CIMB bersedia memberikan kelonggaran yang dipohon. CIMB kemudian meneruskan prosiding perampasan dan ia berhak berbuat demikian (lihat perenggan 43–44 & 46).]

Cases referred to

Ace Heights (M) Sdn Bhd & Ors v BSNC Leasing (M) Sdn Bhd [2015] 1 LNS 1480, CA (refd)

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754; [1994] 3 CLJ 133, SC (refd)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597; [2010] 1 CLJ 269, FC (refd)

CIMB Bank Bhd v Anthony Lawrence Bourke & Anor [2019] 2 MLJ 1; [2019] 2 CLJ 1, FC (refd)

Daud bin Arshad & Ors (representing 61 settlers/participants of FELCRA Gugusan Sungai Ara, Mukim Ulu Sungai Sedili, Daerah Kota Tinggi, Johor) v FELCRA Bhd [2019] 2 MLJ 33; [2018] 1 LNS 1788, CA (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)

A *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243, FC (refd)
Kuala Lumpur Landmark Sdn Bhd v Standard Chartered Bank [1994] 2 MLJ 559, HC (refd)
LCY v TWY [2019] 4 MLJ 203; [2019] 1 LNS 165, CA (refd)

B

Appeal from: Civil Suit No 22NCVC-598–11 of 2015 (High Court, Kuala Lumpur)

Sri Dev Nair (Dennis Xavier and R Rajasurian with him) (K Kulasekar & Assoc) for the appellant.
C *Sean Yeow (Aric Wong with him) (Lee Hishamuddin Allen & Gledhill) for the respondent.*

Hanipah Farikullah JCA:

D

INTRODUCTION

[1] This appeal arises from an order made by the learned High Court judge in Kuala Lumpur High Court on 10 November 2017, which requires the court
E to consider the construction of a settlement agreement reached by the parties.

[2] In this proceeding, the appellant's complains that they had overpaid the respondent RM532,746.75 under a settlement agreement. The appellant
F claimed they had paid RM5,522,746.75 when the settlement sum was only RM4.99m.

[3] After a full trial, the learned judge dismissed the appellant's claim. The learned judge found there was no overpayment. The appellant now appeals
G against that decision.

[4] For convenience, we will refer to the parties in this judgment as they were referred to in the High Court.

H

[5] We heard the parties on 21 February 2019, and reserved our judgments. Having considered the matter as well as the written submission of the parties, we will now give our reasons in respect of the appeal. In short, we dismiss the plaintiff's appeal.

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BACKGROUND

[6] We now turn to the facts of the present case and how it was decided in the court below.

[7] The plaintiff is a customer of the defendant. A

[8] The plaintiff is the registered proprietor of the lands ('land 1, land 2, land 3, and land 4'). B

[9] On 24 September 2010, the High Court allowed the defendant's application for summary judgment against the plaintiff with two others in Kuala Lumpur High Court Civil Suit No D-22 NCC-551 of 2010 for overdraft facilities and term loan ('the said judgment'). The plaintiff was ordered to pay the defendant: (a) for the overdraft facilities, a sum of RM5,329,067.93 as at 6 July 2010 and interest; and (b) for the term loan, a sum of RM589,074.67 as at 6 July 2010 and interest ('the judgment sum'). C

[10] By a letter from the defendant dated 18 March 2011 ('the settlement letter'), the plaintiff and the defendant then agreed to settle the outstanding judgment sum pursuant to the said judgment ('the settlement'). In gist, the agreed settlement sum to be paid by the plaintiff was RM4.99m to be paid over a period of 72 months, that is, 71 monthly instalments of RM50,000 per month starting on 1 May 2011 with a bullet payment for the balance for the last instalment. All payments to be completed by 1 April 2017. D E

[11] The plaintiff failed to comply with the settlement terms. On 22 May 2015 the defendant took out foreclosure proceedings for an order for sale vide Originating Summons No 24F-492–05 of 2015 ('the OS') on the charge held on land 2. Exhibited in the OS were the said judgment and a statement of account as at 30 November 2014 stating that the amount received by the defendant from the plaintiff as at 30 November 2014 was RM5,522,746.75. The defendant subsequently discontinued the foreclosure proceedings because UOB had already obtained an order for sale over the same property. F G

[12] The plaintiff claimed that with the admission that the amount of RM5,522,746.75 was received by the defendant, the plaintiff has overpaid the defendant RM532,746.75 in excess of the agreed settled account of RM4.99m (RM5,522,746.75 – RM4.99m) and was entitled to a refund of the excess payment. The plaintiff pleaded that there were accord and satisfaction by the plaintiff. H

[13] The plaintiff also claimed that the settlement letter did not refer to post-judgment interest on the principal sum of RM4.99m. I

[14] The defendant's pleaded case is that there is no case of an overpayment by the plaintiff.

ISSUES

[15] The issues for determination by this court are as follows:

(a) whether the plaintiff had overpaid the defendant in respect of the judgment sum or the settlement agreement entered into between them on 18 March 2011;

(b) whether the defendant cannot claim interest on the judgment sum; and

(c) whether the defendant is to first terminate the settlement agreement before it can execute the judgment and proceed with foreclosure proceedings.

THE JUDGMENT OF THE HIGH COURT

[16] At the hearing before the learned High Court judge, the plaintiff maintained that the issue of the outstanding judgment sum has been compromised by the terms of the settlement agreement and that the defendant is precluded by the terms of the agreement from imposing post interest. The defendant resisted the claim, contending that there was no overpayment and that there was nothing in that agreement which precluded them from imposing post interest.

[17] The learned High Court judge preferred the submissions made on behalf of the defendant and conclude that the plaintiff had failed to pay RM4.99m as agreed in the settlement agreement.

THE APPEAL

[18] In this appeal, learned counsel for the plaintiff contended that the learned judge fell into errors at every stage of her analysis which we will elaborate in more details later.

[19] Learned counsel for the plaintiff essential proposition in support of this appeal is straight forward and simple. The learned High Court judge was wrong to conclude that there was no overpayment by the plaintiff on the settlement sum. The evidence shows that a total of RM1,224,100 had been paid to the respondent out of which RM619,145.16 was utilised to pay the term loan and the balance sum of RM614,954.84 was utilised for part payment towards the judgment on the overdraft.

[20] We begin by considering the settlement agreement and whether the plaintiff had overpaid the defendant in respect of the judgment sum or the settlement agreement entered into between them on 18 March 2011 which we have summarised the relevant background earlier in this judgment, so we now

turn to the provisions of the agreement itself. The settlement agreement is a letter from the respondent to the appellant for the settlement of the judgment dated 24 September 2010 in Kuala Lumpur High Court Suit No D-22-NCC-551 of 2010.

[21] The Settlement Letter provides as follows:

Our Ref: BCPDM/1414/2011/072/SK/TF | 18 March 2011

The Director
Reebok (M) Sdn Bhd (162388-T)
9E, Wisma Tai Yoon
Lorong Medan Tuanku 1
50300 Kuala Lumpur
(Attention: Dato' Sri Ram Sarma)

Dear Sirs,

RE: SETTLEMENT OF JUDGMENT SUM PURSUANT TO JUDGMENT DATED 24.9.2010

KUALA LUMPUR HIGH COURT SUIT NO: D-22NCVC-551-2010

We refer to your request and wish to inform that the Bank is agreeable to your request to settle the outstanding Judgment Sum on the following terms:

1. The Overdraft is to be repaid in monthly installments of RM50,000.00 permonth over 71 months with 72nd payment being the final bullet payment for the balance of the total outstanding sum.

OVERDRAFT		a) Amount	: RM4,990,000.00 AS AT 18.3.2011
		b) Payment Tenor	: 72 months
		c) Commencement of Payment	: 1st May 2011
		d) Completion of Payment	: 1st April 2017
		e) Monthly installment	: RM50,000.00
		f) Repayment	— Repayment over 71 month installments of RM50,000.00 each with final bullet payment for the balance of the total outstanding sum.

2. The above is subject to the Bank receipt of the following together with the acceptance of this Letter,

i) Six (6) postdated cheques of RM50,000.00 commencing from 1.5.2011 and thereafter

ii) A Letter of Undertaking from Reebok (M) Sdn Bhd to forward 90% of the proceed of sales for a sum of RM747,000.00 by 31.10.2011 obtained

A from the sale of the properties held under 25, Lorong Sri Gambut 2, KL Techno-Industrial Park, Klang 42450 Selangor and Lot 22, Jalan Ferum 27/31 Shah Alam, 40000 Selangor.

3. The Bank will proceed with execution of the Judgment and Foreclosure proceeding in the event of default of any one or more of the said installment payments.

B

The above is strictly without prejudice to the Bank's right to enforce the Judgment against you and the above said Guarantors and to proceed with Foreclosure proceedings should you fail to accept this letter and adhere to the above terms and conditions within the stipulated deadline strictly.

C

Kindly signify your understanding and acceptance of the above settlement terms and conditions by initiating every page and signing on the last page and returning the duplicate of this Letter to us within seven (7) days from the date hereof, failing which the offer shall lapse automatically.

D

Thank you.

Yours faithfully,

for CIMB Bank Berhad (13491-P)

E

.....	.....
SHERLY KAM	GARRY LAM YAT FOU
COMMERCIAL CREDIT MANAGER AREA	COMMERCIAL MANAGER

We hereby confirm our acceptance of the offer and the accompanying terms and conditions as stated hereinabove.

F

REEBOK (M) SDN BHD (162388-t)

.....

Name of Company

G

Date: 25.3.2011

[22] In our opinion, a settlement agreement such as this must be construed in just the same way as any other contract. The aim is to ascertain what a reasonable person would have understood the parties to mean by using the language of the agreement (per Edgar Joseph Jr FCJ in *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754; [1994] 3 CLJ 133).

H

I

[23] Also, in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269, the Federal Court has stated that it is trite that an agreement must be construed by the words used in the agreement and the court is not empowered to improve upon the instrument which it is called upon to construct. This was again

reiterated in the recent Federal Court case *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1; [2019] 2 CLJ 1 (FC). A

[24] In our judgment, the inescapable conclusion from the foregoing is that parties intended by the settlement to compromise all issues in dispute between them, the issues on the outstanding judgment sum and the foreclosure proceeding. B

[25] By the terms of the settlement agreement, the appellant was to pay RM50,000 per month for 71 months commencing on 1 May 2011 with a final bullet payment for the balance remaining on the 72nd payment on 1 April 2017 in respect of the judgment on the overdraft. C

[26] There was no dispute that under the settlement dated 18 March 2011, the amount outstanding was accepted by the parties to be 'RM4,990,000 as at 18.3.2011'. Since the settlement on 18 March 2011, the undisputed evidence shows that the plaintiff had only paid the defendant RM4,804,391.91. Therefore, the learned judge was right to say that there has clearly been no overpayment under the settlement as alleged. D

E

[27] The plaintiff's allegation of the overpayment is based on payments made before the settlement on 18 March 2011. It is, without doubt, their payments made before the settlement on 18 March 2011 cannot be included when considering whether there has been any overpayment under the settlement. The payments made before the settlement have already been taken into account in deriving the outstanding settlement amount of 'RM4,990,000 as at 18.3.2011' as stated in the settlement letter. F

[28] In fact, DW2 in her examination-in-chief gave evidence on all payments made by the plaintiff between 18 March 2011 until the last payment on 28 May 2014. This evidence was not challenged by the plaintiff. The undisputed evidence shows that the total sum paid by the plaintiff since 18 March 2011 between 18 March 2011 and 28 May 2014 amounts to only RM4,804,391.91. Therefore, there has clearly been no overpayment under the settlement agreement. G

H

[29] It is worth noting that the plaintiff's allegation that they had paid a total sum of RM5,522,746.75 includes the two amounts they paid some time before the settlement letter dated *18 March 2011*. RM604,854.84 was paid on *15 November 2010* and RM113,500 was paid on *18 January 2011*. These two amounts were clearly not paid under the settlement agreement. I

[30] There is no evidence whatsoever that the plaintiff has paid more than RM4.99m under the settlement agreement. Therefore, the learned judge was

correct to reject the plaintiff's allegation of overpayment for reasons set out below:

> Was there overpayment of the settlement sum?
>
> 21. That the plaintiff had failed to pay RM4.99m as agreed in the settlement agreement is beyond doubt.
>
> 22. The payments as set out at pp 39–40 in Bundle A and in Annexure A in WS-DW2 clearly show that:
>
> (a) the plaintiff did not pay RM4.99m since 18 March 2011; and
>
> (b) the plaintiff only paid the sum of RM4,804,391.91 since 18 March 2011.
>
> 23. Therefore, the plaintiff could not have complied with all the terms of the settlement and paid the full amount thereafter.
>
> 24. PW1 agreed by reference to the defendant's reply that the plaintiff has paid RM718,354.84 between 24 September 2010 and 18 March 2011. This was before the settlement letter.
>
> 25. Between 18 March 2011 ie from the date of the settlement letter and 28 May 2014, the plaintiff only paid a total of RM4,804,391.91. There was no more payment after 28 May 2014. Therefore, there cannot be an overpayment.
>
> ...
>
> 40. Even if assuming that the plaintiff's allegation that they were only required to pay RM4.99m as the full and final settlement is accepted, there is no overpayment of the settlement sum because the plaintiff had not even paid that amount. The plaintiff has only paid a total sum of RM4,804,391.91 since 18 March 2011 until 28 May 2014. There was no payment thereafter. Thus, there cannot be overpayment and premised on this alone, the plaintiff's claim must fail because their whole case was about overpayment based on the Settlement that was no longer in force.

[31] In the light of all the factors that we have mentioned, there are no grounds to interfere in the findings of fact of the learned trial judge. As can be seen the findings of fact are based on the uncontroverted oral and documentary evidence that clearly shows that there had been no overpayment as alleged.

[32] It is well settled that an appellate court will only intervene with a trial court's findings of fact if it is plainly wrong — *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441 at p 464 (FC) (see also *LCY v TWY* [2019] 4 MLJ 203; [2019] 1 LNS 165 (CA); *Daud bin Arshad & Ors (representing 61 settlers/participants of FELCRA Gugusan Sungai Ara, Mukim Ulu Sungai Sedili, Daerah Kota Tinggi, Johor) v FELCRA Bhd* [2019] 2 MLJ 33; [2018] 1 LNS 1788 (CA)).

JUDGMENT INTEREST

[33] There was an issue between the parties as to whether the plaintiff could claim interest on the judgment sum.

[34] Learned counsel for the plaintiff contended that the settlement agreement is clear on this terms that the settlement sum is RM4.99m to be paid over 72 months. The settlement agreement has been reduced into writing, it does not state any interest.

[35] In support of his submission, learned counsel referred to the case of *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243 (FC) where Mohd Azmi FJ (as he then was) held that:

> ... As far as our law is concerned, the exclusion of oral by documentary evidence, is governed by ss 91–99 of the Evidence Act 1950. Section 91 provides that the content of a document must be proved by the document itself, and s 92 provides that subject to certain provisos, no evidence of any oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding to, or subtracting from its terms. Section 93 further provides that when the language used in a document is on its face ambiguous is defective, evidence may not be given of facts which would show its meaning or supply its defects.

[36] We are unable to accept the plaintiff's submission. We say that for the following reasons. In our view, nowhere in the settlement letter is it stated that this is the full and final settlement sum. The amount of RM4.99m stated in the settlement letter dated 18 March 2011 is expressly stated to be merely the amount 'as at 18.3.2011'. Therefore, there can be no doubt, that it is not the full and final settlement sum to be paid. We are therefore satisfied that the terms of the agreements are sufficiently broad to include the defendant from claiming interest on the judgment sum. In our judgment, the parties are taken to have intended that the interest should apply to claims of the kind now in issue.

[37] It is convenient here to point out that by a letter dated 29 January 2015, the plaintiff said it will:

> ... settle RM200,000.00 in February 2015 and continue to pay RM50,000.00 per month till September 2015 whereby we will make another RM350,000.00 to update our status to current leaving a balance of approximately RM1 million owing to your bank.

[38] In our opinion, it is obvious from the contemporaneous conduct of the plaintiff that the plaintiff was never under the impression that the RM4.99m was a full and final settlement sum but only the amount outstanding as at the

A date of the settlement letter on *18 March 2011* as expressly stated in the settlement letter.

[39] It is we think important to note that even assuming that the settlement sum under the settlement agreement can be said to be a full and final settlement
B sum of RM4.99m as alleged by the plaintiff the undisputed evidence shows that the plaintiff has not even paid the sum of RM4.99m under the settlement, let alone RM5,522,746.75.

TERMINATION OF THE SETTLEMENT
C

[40] The final point raised by the plaintiff was the fact that the defendant is to first terminate the settlement agreement before it can execute the judgment and proceed with foreclosure proceedings.

D

[41] With respect, we do not agree with the plaintiff's submission.

[42] Under the settlement letter dated 18 March 2011, it is expressly provided that the defendant is entitled to proceed with execution of the
E judgment and foreclosure proceeding in the event of default of any one or more of the said installment payment. It is also expressly provided that the settlement is strictly without prejudice to the bank's right to enforce the judgment and to proceed with foreclosure should the plaintiff fail to adhere to the settlement terms within the stipulated deadline strictly.

F

[43] The evidence demonstrated that:

(a) by a letter dated 15 January 2015, the plaintiff sought indulgence to defer payment under the settlement;

G (b) the defendant by its letter dated 26 January 2015 stated it will only consider withholding legal action subject to an immediate and minimum payment of RM200,000. The defendant also stated that 'until settlement is reached between the parties, the Bank shall proceed' accordingly;

H (c) it is not disputed that the plaintiff did not make immediate payment of the minimum RM200,000 stipulated by the defendant for withholding legal action. Instead, PW1 admitted this during cross-examination; and

(d) the plaintiff then proceeded to commence foreclosure proceedings on 22 May 2015.

I

[44] We agreed with the defendant that the proper conclusion on these facts is that the settlement has broken down and no longer in force when the plaintiff requested for indulgence for not complying with the terms of the settlement but did not comply with the condition on which the defendant was

willing to grant the indulgence sought. In the event, the defendant proceeded with foreclosure proceedings which it was expressly entitled to do if the plaintiff failed to comply with the settlement terms. Therefore, the settlement is clearly no longer valid after this.

[45] In our opinion, in the event of any settlement or compromise between parties, any court proceedings already started shall be terminated. A party who wishes to revive his original claim in the event of the other party's inability to comply with his obligation under the terms of the settlement should incorporate such term in the settlement agreement to give effect. The learned Author David Foskett's in *The Law and Practice of Compromise* which was referred to by the court in *Ace Heights (M) Sdn Bhd & Ors v BSNC Leasing (M) Sdn Bhd* [2015] 1 LNS 1480 (CA) opined as follows:

> Generally speaking, therefore, an agreement of compromise will discharge all original claims and counterclaims unless it expressly provides for their revival in the event of breach. Reference had been made previously to a compromise defeasible upon condition subsequent. Where a party is anxious to be able to revive his original claim in the event of the other party's failure to comply with his obligations under the compromise, a term to that effect (which will, in effect, be one defeating the compromise upon the failure of the subsequent condition) should be incorporated. This applies to mere agreements and those effectuated by a judgment or order reflecting finality.

(See also: *Kuala Lumpur Landmark Sdn Bhd v Standard Chartered Bank* [1994] 2 MLJ 559 (HC)).

[46] In the present case, the settlement agreement expressly provides for the revival of the defendant's rights to proceed with foreclosure proceedings in the event of default. Therefore, there can be no question that the defendant was entitled to commence foreclosure proceedings after the plaintiff had defaulted on the settlement.

CONCLUSION

[47] It follows that the appeal must be dismissed with costs and the decision of the High Court is affirmed.

Appeal unanimously dismissed; High Court's decision affirmed.

Reported by Ashok Kumar